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IN THE

Supreme Court of the United States

EMPIRE HEALTHCHOICE ASSURANCE, INC.,
doing business as Empire Blue Cross Blue Shield,

Petitioner,

v.

DENISE FINN MCVEIGH, as administratrix of
the Estate of Joseph E. McVeigh,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF OF PETITIONER

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Empire HealthChoice Assurance, Inc. ("Empire") respectfully files this reply to Respondent's brief in opposition to Empire's petition for a writ of certiorari.

ARGUMENT

A. There Is a Conflict Among the Circuits on the Question Presented

Respondent contends that there is no real disagreement among the circuits on the question whether the federal courts have jurisdiction over FEHBA reimbursement controversies, "only different results based upon different facts." Br. in Opp. at 6. In particular, Respondent contends that Empire has not alleged or proven any "'actual, significant' conflict between state law and the federal interests underlying the FEHBA recovery provisions so as to confer subject matter jurisdiction," whereas the decisions from other circuits supposedly did identify such conflicts. *Id.* (quoting *Empire*, Pet. App. 6a-7a).

But Respondent errs on several fronts. First of all, she focuses solely on the portion of the Second Circuit decision's dealing with *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), ignoring the circuit splits created by the other parts of the court of appeals' determination. Then, even with respect to *Boyle*, Respondent miscomprehends the Second Circuit's decision, overlooks the Fourth Circuit decision that creates a circuit conflict on the *Boyle* issues, and ultimately disregards the record in contending that Empire's case suffered from a failure of proof. In the end, even limiting the discussion just to *Boyle*, the outcome in this case as well as the reasoning is irreconcilable with the decisions of the other courts of appeals.

1. Respondent Ignores the Circuit Splits Unrelated to *Boyle*

Respondent's presentation relates almost exclusively to just one of the three bases reached by the Second Circuit for rejecting federal jurisdiction. Respondent focuses on whether federal common law governs the controversy pursuant to *Boyle*

v. United Technologies Corp., 487 U.S. 500 (1988). Only in its *Boyle* analysis did the court of appeals discuss any need for an "actual, significant" conflict before federal common law would displace state law. Yet, in its original decision, the court of appeals also addressed, and rejected, federal jurisdiction based on preemption under FEHBA's preemption provision, 5 U.S.C. § 8902(m)(1); in its rehearing determination, the court of appeals rejected jurisdiction founded on *Jackson Transit Authority v. Local Division 1285*, 457 U.S. 15 (1982).

There is no requirement of any conflict between state and federal law under FEHBA's preemption provision. Congress expressly removed that requirement by amending the statute in 1998. *See* Pet. 16. Additionally, the test for jurisdiction under *Jackson Transit* rests on Congress's intent, most specifically on whether Congress intended that the rights and duties contained in a contract be "federal in nature." *Jackson Transit*, 457 U.S. at 23; *see also* Pet. 19-20. Thus, even if Respondent were correct that there is no "actual, significant" conflict between state and federal law in this case, but there were state-federal conflicts evident in the other relevant circuit decisions, it would still leave two decisional bases for review.

Indeed, the initial circuit conflict listed by Empire in the petition – the one between this decision and *Blue Cross Blue Shield of Illinois v. Cruz*, 396 F.3d 793 (7th Cir. 2005), *petition for cert. filed*, No. 04-1675 (June 6, 2005) – has nothing to do with *Boyle*. In *Cruz*, the Seventh Circuit found federal jurisdiction based on FEHBA's preemption provision, noting that it need not reach any *Boyle* issue. The Seventh Circuit neither identified nor required any actual, demonstrated conflict between a specific state law and federal interests; instead, it concluded that the objective of national uniformity embodied in FEHBA's preemption section mandated the preemption of all state law in the area, leaving federal common law to fill the void. Respondent seeks to distinguish *Cruz* on a basis entirely foreign to the Seventh Circuit's determination.

The Second Circuit recognized (on rehearing) that its decision and *Cruz* are irreconcilable (*see* Pet. App. 50a), which therefore puts Respondent in the untenable position of asserting that a circuit conflict does not exist when in fact the court whose decision Respondent seeks to uphold has itself identified the conflict. Furthermore, Empire also identified circuit splits created by the Second Circuit's FEHBA preemption holding that state laws of general application are not preempted. *See* Pet. 12. Respondent's assertions about *Boyle* in no manner would negate those circuit conflicts.

2. In Any Event, the Second Circuit's *Boyle* Analysis Generates Circuit Splits

Even with respect to the Second Circuit's *Boyle* analysis, Respondent overlooks the circuit decision that Empire has cited as conflicting with the Second Circuit's opinion. The Second Circuit was the first court in the FEHBA setting to require a conflict between a *specific* state law and federal interests before finding that federal common law governs the area. The Fourth Circuit, in *Caudill v. Blue Cross & Blue Shield of N.C., Inc.*, 999 F.2d 74, 79 (4th Cir. 1993), ruled that, "[w]hen the federal interest requires the application of a uniform rule, federal common law displaces state law entirely," even absent "any specific conflict between federal interest[s] and state law." The *Boyle* issue on which the circuits disagree, therefore, is whether a federal interest in uniformity alone is sufficient for the displacement of state law – with the Fourth Circuit saying it is, and the Second Circuit saying it is not. *See* Pet. 12 (noting Second Circuit's own statement that its decision conflicts with *Caudill*). It cannot be disputed that, in *Caudill*, no litigant identified a specific state law with which federal objectives conflicted; it was the entire body of state contract law that the Fourth Circuit deemed to collide with the federal desire for uniformity.

And on the application of *Boyle* itself, Respondent fails to recognize that Empire *did* identify a specific state law that

conflicts with federal objectives. In the district court, Respondent not only sought dismissal for lack of jurisdiction, but also summary judgment on the grounds that Empire's reimbursement claim was allegedly untimely under a 60-day New York statute of limitations. *See* J.A. A823-A824; *see also* Br. in Opp. at 2. The Service Benefit Plan's reimbursement provision contains no such limitations period. Respondent's reliance on the New York statute of limitations creates exactly the sort of "actual, significant" conflict with the federal interests that she contends must exist for *Boyle* to authorize the application of federal common law. While the Second Circuit concluded that this conflict was brought to its attention too late, Empire could not have predicted that the court of appeals would insist on a conflict with a specific state law as a necessity under *Boyle*. Empire raised the statute-of-limitations issue at the very first moment – *i.e.*, on rehearing – that anyone could have gleaned it would be relevant to the case's disposition.

In the end, though, the Second Circuit still would not have found federal jurisdiction even with the "actual, significant" conflict that Respondent says is needed. In its rehearing decision, the panel majority noted that, "[i]n any event, the argument [about the conflict created by the statute of limitations] could not have made a difference under the original opinion's analysis." Pet. App. 48a n.3. This is because Judge Sotomayor originally found that, even with a conflict engendered by "a state law that was meant to advance a particular state policy," federal common law supposedly would only enter the case by way of a defense. Pet. App. 8a. Since federal jurisdiction must be founded on the well-pleaded complaint, not a defense, she thought it would then be left to the state courts to resolve the case based on federal common law. *See id.* at 8a-10a & n.4, 15a n.9.

The Second Circuit, then, because of its view of the well-pleaded complaint rule, would not find federal jurisdiction even with the sort of "actual, significant" conflict that Respondent

claims to have existed in *Cruz* and *MedCenters Health Care v. Ochs*, 26 F.3d 865 (8th Cir. 1994). That in itself is a split in the circuits, given that both *Cruz* and *MedCenters* upheld federal jurisdiction.

B. The Question Presented Is of National Importance

Respondent contests that there are "compelling reasons" for review in this Court. Br. in Opp. at 5. The United States, however, has already emphasized the case's importance. At the rehearing stage in the court of appeals, the United States filed an *amicus* brief stating:

> This suit implicates critical aspects of the program under which the federal government provides health insurance benefits to its own employees. In concluding that the suit presented no federal question conferring jurisdiction on the district court, the panel misapprehended the nature of the contract at issue in this suit, which determines the rights, benefits and duties of program enrollees, insurance carriers, and the federal government itself. Its decision conflicts with authoritative decisions of other courts of appeals that have addressed this issue and presents a question of exceptional importance warranting further review.

Pet. App. 66a. It is not credible for Respondent to assert that there is no "'compelling' federal interest that deserves the attention of this Court," when the federal government – whose program is at issue in this case – has itself advocated otherwise. Br. in Opp. at 5.

Respondent next challenges Empire's assertion that the Second Circuit's decision potentially throws into disarray the FEHBA program. Respondent demands specific examples of how state court adjudication and the application of state law in FEHBA controversies would lead to "'uncertainty and disparate treatment'" or "divergent decisions among the states." *Id.* (quoting Pet. 13). Empire supplied those examples in the

Petition, but briefly reviews them further here. *See* Pet. 13 (noting that Second Circuit's reading of FEHBA's preemption provision leaves the government, carriers, and enrollees unable to predict whether various laws of general application are preempted).

For instance, this Court has long recognized that health plan beneficiaries in other federal programs often attempt to use state tort law and consumer protection laws as an end run around available, but more limited, federal remedies. *E.g.*, *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 207, 211 (1985) (finding that Labor Management Relations Act preempts state "tort of bad faith"). Resting on FEHBA's preemption clause, the courts previously have rejected efforts to apply similar state laws in the FEHBA context. *E.g.*, *Hayes v. Prudential Ins. Co. of Am.*, 819 F.2d 921, 926 (9th Cir. 1987); *Rievley v. Blue Cross Blue Shield of Tenn.*, 69 F. Supp. 2d 1028, 1031-37 (E.D. Tenn. 1999); *Kight v. Kaiser Found. Health Plan of the Mid-Atlantic States, Inc.*, 34 F. Supp. 2d 334, 340-42 (E.D. Va. 1999). In light of the Second Circuit's decision, the prospect now is that, where a FEHBA enrollee is unhappy with the administration of a plan, he or she may seek to invoke state tort and similar laws to vindicate the grievance.

In addition, this Court established early on in its ERISA jurisprudence that state anti-discrimination laws cannot be used to expand the scope of coverage under an ERISA plan. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 (1983) (finding that ERISA preempts state human rights law that prohibited conduct allowed under federal law). Under the Second Circuit's reasoning, these state laws potentially can be used to expand the scope of coverage or perhaps even who can enroll in a plan, if the state requirement is contained in an anti-discrimination law of general application. That is particularly troubling because, when enacting FEHBA's original preemption clause, Congress expressly viewed as falling within FEHBA's preemptive ambit "State laws or regulations which

specify . . . extent of benefits, coverage of family members, age limits for family members or other matters relating to health benefits or coverage." H.R. Rep. No. 95-282, at 4-5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 273.[1]

C. Empire Does Not Challenge Any Factual Findings

In an effort to muddle the legal issues presented to this Court, Respondent contends that Empire believes "the Second Circuit made erroneous factual findings." Br. in Opp. at 3. Empire asserts nothing of the sort. Empire maintains that the court of appeals misconstrued FEHBA's preemption provision and failed properly to apply *Jackson Transit Authority v. Local Division 1285*, 457 U.S. 15 (1982), and *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). These are legal questions. To the extent any facts are pertinent, they are as stated in the complaint (since the case was resolved on a motion to dismiss) or as recognized by the lower courts. *See* Pet. App. 2a-4a.

What Empire does contest is the Second Circuit's *characterization* of the FEHBA contract and the Statement of Benefits incorporated into it as some "privately-negotiated contract." Pet. App. at 12a. The contract is a *government* contract, made pursuant to federal statute and regulations that govern the rights and benefits of federal enrollees. Moreover, the Statement of Benefits, by statute, reflects the benefits and other Plan provi-

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[1] Empire does not concede that these laws would apply, even if the Second Circuit's decision were to remain undisturbed. Empire would vigorously assert that traditional conflict preemption principles necessitate preemption even in the absence of an express preemption section. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873-74 (2000). But the point is that the applicability of state laws whose preemption previously had been settled would now be open to question (and their preemption would depend on establishing, under ordinary preemption principles, conflicts nowhere required under the preemption clause).

sions that OPM has selected. In this regard, FEHBA mandates that every FEHBA contract "shall contain a detailed statement of benefits offered and shall include such maximums, limitations, exclusions, and other definitions of benefits as *the Office* considers necessary or desirable." 5 U.S.C. § 8902(d) (emphasis added). As such, the Statement of Benefits' "provisions are rules under the Administrative Procedure Act, 5 U.S.C. § 551(4)." *Caudill v. Blue Cross & Blue Shield of N.C., Inc.*, 999 F.2d 74, 80 (4th Cir. 1993); *see* 5 U.S.C. § 551(4) (defining rule as an agency statement prescribing or approving services or allowances and having prospective effect). Evincing that the Statement of Benefits is essentially a rule, not some private instrument, the D.C. Circuit (per Justice, then-Judge, Ginsburg) has noted that any challenge to the content of the Statement of Benefits is governed by the Administrative Procedure Act and its arbitrary-and-capricious review standard. *See Doe v. Devine*, 703 F.2d 1319, 1321, 1326 (D.C. Cir. 1983).

D. Congress Intended to Confer Federal Jurisdiction

Respondent's final argument relates to the merits of the Second Circuit's decision, not to the depth of the circuit split or to the national importance of the case. Respondent asserts that 5 U.S.C. § 8912, which provides for federal jurisdiction over FEHBA suits against the United States, forecloses jurisdiction over other FEHBA matters. Supposedly Congress cannot be said to have "intend[ed] to authorize other remedies" when it enacted that jurisdictional provision. Br. in Opp. at 8.

Respondent's argument is inconsistent with this Court's decision last Term in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 125 S. Ct. 2363 (2005). As noted in the petition (Pet. 21), the Court there squarely rejected the notion that lack of a federal statutory cause of action is somehow "dispositive" of federal question jurisdiction. *Id.* at 2370. *Grable*, like this case, was a suit between private parties; it was a quiet-title action commenced after an IRS sale of the property. Importantly, and also like in this case, there was no

statutory cause of action covering the case, but federal law did create a cause of action *if the government were the defendant*. *Id.* at 2370 n.4. The Court affirmed the lower courts' finding of federal question jurisdiction over the suit between private parties, emphasizing the "'federal interest at stake'" and particularly that "[t]he Government had a strong interest" in the case. *Id.* at 2367, 2370 (quoting *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 814 n.12 (1986)).

Respondent's real complaint in opposing certiorari is that she believes it would have been simpler and cheaper to resolve the federal issues in a state forum, such as "in Surrogates' Court." Br. in Opp. at 1 n.1. Respondent ignores the benefit created by federal adjudication – namely, as noted in *Grable*, "the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues." *Grable*, 125 S. Ct. at 2367. Empire is the master of its complaint, and it was entitled to bring the case in federal court, where a uniform body of federal common law could develop and govern.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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